September 13, 2013

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
          CG Docket No. 02-278**

Dear Ms. Dortch:

On Wednesday, September 11, 2013, as counsel to Communication Innovators, I met with Kris Monteith, John B. Adams, Mark Stone, Lynn Follansbee, Kristi Lemoine, and Sara Kuehnle from the Consumer & Governmental Affairs Bureau ("Bureau") to discuss the pending Communication Innovators ("CI") Petition for Declaratory Ruling ("Petition") regarding the non-telemarketing use of predictive dialing solutions under the Telephone Consumer Protection Act ("TCPA").[1]

During the meeting, I encouraged the Commission to address the widespread confusion – and resulting harmful class action litigation – regarding whether predictive dialing solutions that lack the statutorily-required ability to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers, are "automatic telephone dialing systems" ("autodialers") under the TCPA. Today's predictive dialing solutions promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information. They also facilitate compliance with federal and state laws, and callers using predictive dialing solutions to place non-telemarketing calls have no need for or incentive to call random or sequential numbers. Instead, they use the solutions to place calls to specific individuals and for limited, informational purposes.

I explained that there is significant confusion by plaintiffs' attorneys and courts over the Commission's prior TCPA decisions regarding the applicability of the TCPA to predictive dialers. For

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[1] Communication Innovators, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) ("Petition").

example, some courts have interpreted the prior decisions to mean that any predictive dialing solution is an autodialer, regardless of whether it has the statutorily required "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers."[2] Other courts have held that the Commission altered the statutory definition of autodialer such that now any equipment that has "the capacity to dial numbers without human intervention" is an autodialer.[3] Emboldened, some plaintiffs are now even claiming that under the Commission's prior decisions, manually dialing wireless telephone numbers is a violation of the autodialer restriction if the calls are made using equipment that "has the capacity to autodial."[4]

The Commission can resolve much of this litigation by issuing a narrow declaratory ruling acknowledging that: (1) there are a variety of predictive dialing solutions available today; and (2) to be considered an autodialer, any solution must have the "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers."

This ruling is consistent with and supported by the Commission's prior TCPA decisions. For example, in its 2003 TCPA Order, the Commission addressed a specific type of predictive dialing solution that involved pairing predictive software with an autodialer, and it affirmed that parties may not circumvent the autodialer restriction in this fashion:

> Therefore, to exclude from these restrictions equipment that use[s] predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages. We believe the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented.[5]

The Commission's underlying concern was that parties could start with autodialer hardware and add predictive dialing software in an attempt to evade the autodialer restriction. The autodialer hardware, not the predictive dialing software, had the "capacity to store or produce numbers to be called, using a random or sequential number generator," and could dial those randomly or sequentially generated numbers, thereby meeting the statutory definition of an autodialer – even when paired with the software. Contrary to what some plaintiffs have been arguing, the Commission did not find that the predictive dialing software in itself was what *made* the system an autodialer. Instead, it determined that pairing such software with autodialer equipment would not make the

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[2] *See, e.g., Griffith v. Consumer Portfolio Services*, Inc., 838 F. Supp. 2d 723 (2011); *see also* 47 U.S.C. § 227(a)(1).

[3] *See, e.g., Gragg v. Orange Cab Co., Inc.*, ---F.Supp.2d---, 2013 WL 1788479 at *2 (W.D. Wash. April 26, 2013); *Buslepp v. Improv Miami*, 2012 WL 4932692 at *2 (S.D. Fla. Oct. 16, 2012).

[4] *See, e.g., Mudgett v. Navy Fed. Credit Union*, 2012 WL 870758 at *2 (E.D. Wis. 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 at *4 (N.D. Ill. 2011).

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 133 ("2003 TCPA Order").

autodialer equipment suddenly exempt from the autodialer restriction because of the software's ability to dial from a calling list.[6]

Although the Commission was addressing a specific type of predictive dialing solution in 2003 (*i.e.*, software solutions that were paired with autodialing equipment), it recognized that other solutions were likely to evolve and stated that it "fully expect[ed]" dialing technology to continue to develop.[7]

The Commission should confirm that, to be considered an autodialer, any predictive dialing solution must have the "capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial such numbers." The Commission recognized in the 2003 TCPA Order the importance of construing the TCPA to give effect to every word of the statute,[8] and this approach would be consistent with both the statutory text of and legislative intent behind the TCPA. Importantly, it would also give meaning to the phrase "using a random or sequential number generator."[9]

Issuing the requested declaratory ruling would also be consistent with the Commission's statement in the 2003 TCPA Order that the autodialer restriction "applies to modems that have the 'capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.'"[10] In addition, it would be consistent with the FCC's longstanding precedent that the autodialer restriction "clearly" does not apply "to functions like 'speed dialing,' 'call forwarding,'" and other services where "the numbers called are not generated in a random or sequential fashion."[11] Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in all kinds of electronics, including smartphones, under the autodialer definition.

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[6] In 2008, the Commission also confirmed that predictive dialing solutions used for debt collection calls can meet the definition of an autodialer even when they only call from calling lists. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559 (2008). Consistent with the discussion of the 2003 TCPA Order above, this would be the case if an autodialer were paired with a predictive dialing solution, as adding predictive dialing software does not change the fact that the underling hardware is an autodialer (even if the random or sequential number generation and dialing features are no longer used). However, if the predictive dialing software is paired with some equipment other than an autodialer (*e.g.*, equipment that has no random or sequential number generation and dialing features), the software would not turn the equipment into an autodialer.

[7] 2003 TCPA Order ¶ 131. As explained by CI in its Petition and through other filings in this docket, predictive dialing solutions are also available that involve no hardware "pairing" whatsoever (*e.g.*, software-only and cloud-based technologies). *See, e.g.*, Petition at 19-22; Reply Comments of Communication Innovators, CG Docket No. 02-278, 3-7 (filed Nov. 30, 2012); *Ex Parte* filing from Communication Innovators, *et al.*, CG Docket No. 02-278 (filed May 10, 2013).

[8] 2003 TCPA Order ¶ 132 n. 6 (citing cases that require the construction of statutes in such a way "to give effect, if possible, to every clause and word of a statute").

[9] *See* 47 U.S.C. § 227(a)(1).

[10] 2003 TCPA Order ¶ 133 n. 442.

[11] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

        Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

Mark W. Brennan
Counsel to Communication Innovators
mark.brennan@hoganlovells.com
D 1+ 202 637 6409

cc: Kris Monteith
        John B. Adams
        Mark Stone
        Lynn Follansbee
        Kristi Lemoine
        Sara Kuehnle